IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5445

GERALD SHADWICK,
Appellant,

v.

CITY OF TAMPA,
Appellee.

APPEAL FROM THE SUPREME COURT OF FLORIDA

REPLY BRIEF FOR THE APPELLANT

MALORY B. FRIER
1809 North Howard Avenue
Tampa, Florida 33607
Counsel for Appellant

Of Counsel:
Daniel A. Rezneck, Esq.
of the firm of
ARNOLD & PORTER
1229 19th Street, N.W.
Washington, D.C. 20036

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I.

Appellee misconceives Appellant's argument with respect to the affidavit supporting the arrest warrant in the present case. Appellee concedes, as it must, that "an affidavit which is conclusory such as here involved (A. 4) is not constitutionally sufficient" (Appellee's Brief, p. 6). Appellee, however, contends that the "issue regarding the conclusory affidavit" was not raised below. (*Id.*, p. 7).

Appellant does not rely on the insufficiency of the affidavit as an independent ground for the invalidity of the

Florida warrant procedure in this case. Throughout the proceedings in the Florida courts and in this Court, Appellant has challenged the constitutionality, on their face, of the Florida statutes which authorize clerks of the City of Tampa to issue arrest warrants. The issue is whether clerical personnel can be empowered to exercise this judicial function under the Fourth and Fourteenth Amendments.

The significance of the affidavit and warrant in the present case (App. 6-7) is that they vividly point up the danger implicit in the Florida procedure—that clerical personnel will simply "rubber stamp" the warrant applications of law enforcement officers. This Court has repeatedly warned against "rubber stamp" warrants and has emphasized that the Fourth and Fourteenth Amendments require the independent judgment of a judicial officer whether to issue a warrant. See, *e.g.*, *United States v. Ventresca*, 380 U.S. 102, 109 (1965); *Aguilar v. Texas*, 378 U.S. 108, 111 (1964); *Camara v. Municipal Court*, 387 U.S. 523, 541 (1967).

Examination will show that the arrest warrant signed and issued by the deputy clerk in the present case is literally a carbon copy of the affidavit sworn to by a police officer; the affidavit, in turn, is a printed form, containing the rubberstamped conclusion of the officer that a law has been violated. Our point, however, would be the same, even if the affidavit complied with this Court's teaching in *Giordenello v. United States*, 357 U.S. 480 (1958), and subsequent cases. The Florida procedure is constitutionally flawed because it reduces the judicial function of issuing arrest warrants to a ministerial act performed by clerical personnel.

II.

Appellee's principal reliance is on this Court's *dictum* many years ago in *Ocampo v. United States*, 234 U.S. 91, 100 (1914), that:

> "the function of determining that probable cause exists for the arrest of a person accused is only *quasi*-judicial, and not such that, because of its nature, it must necessarily be confided to a strictly judicial officer or tribunal."

Ocampo, however, is not controlling in the present case for a number of reasons:

1. *Ocampo* did not involve or validate the issuance of arrest warrants by clerical personnel. The arrest warrants in *Ocampo* were in fact issued by a judge. 234 U.S. at 93.

2. No Fourth Amendment issue was raised or decided in *Ocampo*. The statement relied on by Appellee was not in response to a Fourth Amendment claim. The claims in *Ocampo* were not based on the United States Constitution, but on the orders of the Military Governor of the Philippine Islands and the Philippines Bill, an Act of Congress. 234 U.S. at 93. This Court did not render any constitutional decision in *Ocampo*. 234 U.S. at 98. Its decisions with respect to the Philippine Islands and the Philippines Bill have never been authoritative as to the United States Constitution. *Green v. United States*, 335 U.S. 184, 197 (1957).

3. The principal claims in *Ocampo* were that prosecution of the defendants for criminal libel could not be initiated without a preliminary judicial examination to determine probable cause or an indictment by a grand jury. 234 U.S. at 93-95. *Ocampo* held that the prosecution could be initiated by information.

4. *Ocampo* is of doubtful relevance to any Fourth Amendment question. Insofar as the Court in *Ocampo* stated that a prosecutor may be given the function of determining probable cause for arrest (234 U.S. at 100-01), *Ocampo* has already been discarded. This Court held last year in *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971), that such a function may not constitutionally be confided to a prosecuting official.

5. The *Ocampo dictum* relied on by Appellee has also been outmoded by events. This Court's decisions in

Giordenello, *Aguilar*, and *Ventresca*, *supra*, make clear the judicial nature of the decision to issue an arrest warrant. If a law enforcement official's affidavit were entitled to "perfunctory approval," it would make little difference who was empowered to issue an arrest warrant. But *Giordenello* emphatically rejects any such notion. 357 U.S. at 487. This Court there emphasized the constitutional necessity for an independent judgment of the justification for an arrest and the "issues of subtlety and complexity" in the warrant decision. 357 U.S. at 483; 486-487. In *Jones v. United States*, 362 U.S. 257, 270-71 (1960), and other cases, this Court has identified still another factor—the strong preference for a meaningful warrant procedure as an aid to law enforcement, serving to validate police judgments in doubtful or marginal cases by interposing the evaluation of "an independent judicial officer." *Jones v. United States*, 362 U.S. at 270.

These decisions have transformed the law relating to issuance of warrants and have superseded the over-simplified approach of the *dictum* in *Ocampo*.[1]

III.

As we have indicated in our Brief (p. 7), this Court's recent decisions state that the determination whether to issue a warrant is to be made by a "judicial officer." Clerical personnel who lack independent status and qualifications to administer a warrant procedure are not "judicial officers" within the meaning of this Court's decisions.

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[1] The cases listed by Appellee at pp. 12-13 of its Brief cite *Ocampo* for a variety of propositions. With the exception of the present decision of the Florida Supreme Court, however, none relies on *Ocampo* for the proposition that the Fourth and Fourteenth Amendments permit clerical personnel to issue arrest warrants.

That the issuance of warrants is not a clerical but a judicial function, requiring a judicial officer with independent status and qualifications for the task, was recently recognized by Congress when it enacted the Federal Magistrates Act of 1968, 82 Stat. 1107. The background and provisions of that Act are instructive and relevant to the issue in the present case. Although we do not contend that the Fourth and Fourteenth Amendments mandate imposition of the particular provisions of the Federal Magistrates Act on the States, the Act embodies certain principles fundamental to the administration of a warrant procedure. In effect, Congress defined the characteristics of the "neutral and detached magistrate" required by the Fourth Amendment. The Act identifies the kinds of safeguards and qualifications necessary to assure the independence and competency of these judicial officers. Comparison of the Florida procedure with the Act helps to demonstrate that Florida has fallen far below the minimum standards for a constitutionally permissible warrant procedure.

The Federal Magistrates Act grew out of an extensive study of the U.S. Commissioner System lasting several years. See S. Rep. No. 371, 90th Cong., 1st Sess., p. 9. The Congressional committees solicited the views of every Federal judge, U.S. Attorney, U.S. Commissioner, and numerous bar associations and members of the bar. The Act therefore represents a consensus of an extraordinarily broad spectrum of informed legal opinion. It received the formal endorsement of the Judicial Conference of the United States and the American Bar Association. *Id.*

One of the "most notable" of the "many substantial defects" which both the Senate and House Judiciary Committees found in the U.S. Commissioner system was that:

> "Commissioners in many districts grant search and arrest warrant applications perfunctorily, thereby depriving both the accused and the legal system of an independent determination of the question of probable cause." S. Rep. No. 371, 90th Cong., 1st

Sess., p. 10; H. Rep. No. 1629, 90th Cong., 2d Sess., p. 13.[2]

Congress enacted comprehensive provisions designed to assure that the new U.S. Magistrates would have both independence and qualifications for performance of their functions. Thus U.S. Magistrates are appointed by the judges of the District Courts and are responsible solely to the courts they serve. (28 U.S.C. §631(a)) They have a guaranteed tenure of office—8 years for a full-time Magistrate and 4 years for a part-time Magistrate. (28 U.S.C. §631(e))[3] A Magistrate can be removed during his term of office only for specified cause; removal must be voted by a majority of the judges of the District Court which appointed him or of the judicial council of the circuit; and removal may not occur without specification of the charges and opportunity for hearing. (28 U.S.C. §632(h)) Congress believed that "the term and tenure provisions of the act will assure both judicial independence and facilitate the appointment of the most qualified individuals." S. Rep. No. 371, 90th Cong., 1st Sess., p. 16.

Furthermore, the Act is explicit that Magistrates are judicial officers exercising judicial functions. (28 U.S.C. § 632)[4] They are deemed to be officers in the judicial

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[2]The hearings before the Senate and House Committees disclosed that warrant applications in many instances were being "handled on a mass production basis," and the issuance of a warrant was often "little more than a rubber stamp" of the application. See Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee on S. 3475, 89th Cong., 2d Sess., 1966, and on S. 945, 90th Cong., 1st Sess., 1967, pp. 7, 9, 238-39, 472-474, 561, 651 (hereinafter "Senate Hearings").

[3]The salary of a full-time Magistrate cannot be reduced during his term below that fixed at its beginning. (28 U.S.C. §634(b))

[4]Witnesses repeatedly pointed out the "judicial nature" of the functions of the Commissioners, including issuance of warrants. See, *e.g.*, Senate Hearings, pp. 14, 25-26, 238-39; Hearings before Subcommittee No. 4 of the House Judiciary Committee, 90th Cong., 2d Sess.,

branch of the Government. (28 U.S.C. § 634(c)) They take the same oath as federal judges. (28 U.S.C. § 631(f)) The appointing court must make the specific determination that a magistrate is "competent to perform the duties of the office." (28 U.S.C. § 631(b)(2)) No individual may be appointed as a full-time Magistrate unless he is a member of the bar. (28 U.S.C. § 631 (b)(1)) Even a part-time Magistrate must be a lawyer, unless both the appointing court and the Judicial Conference of the United States find that no qualified lawyer is available to serve at a specific location. (28 U.S.C. § 631 (b)(1)) Congress determined that "wherever possible, U.S. magistrates must be qualified attorneys." S. Rep. No. 371, 90th Cong., 1st Sess., p. 14.[5]

Finally, Congress attached importance to the continued legal training of Magistrates, as an additional guarantee of their competency to carry out their functions. The Federal

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on the Federal Magistrates Act, 1968, pp. 69, 92, 159. The report of the Judicial Conference of the United States likewise stressed that the Commissioners exercised "judicial power." *Id.*, p. 148.

[5]The framers of the Act were also cognizant of the problems created by the issuance of warrants by clerical personnel; a number of the Commissioners were clerks or deputy clerks of District Courts. S. Rep. No. 371, 90th Cong., lst Sess., p. 15. Congress heard testimony in the Hearings expressing doubt "whether most deputy clerks possess the legal expertise or the independence of judgment required to determine when an arrest warrant should be issued under the standards reflected in the decisions of the Supreme Court. . . . The exercise of such judicial discretion should be entrusted to a magistrate and not a clerk." Hearings on the U.S. Commissioner System, Subcommittee on Improvements in Judicial Machinery, Senate Judiciary Committee, 89th Cong., 2d Sess., 1966, p. 268; see also *id.*, pp. 274, 277, 281.

As a result Congress provided that a clerk or deputy clerk of a federal court could be appointed only as a part-time Magistrate and only with the approval of the Judicial Conference. (28 U.S.C. § 631(c) Such appointees must also meet all other prescribed qualifications and requirements for Magistrates, including bar membership, and they have the same protections as to tenure of office and removal as other Magistrates. See S. Rep. No. 371, 90th Cong., 1st Sess., p. 15.

Judicial Center is directed to conduct an introductory training program for new Magistrates, within a year after initial appointment, and thereafter to conduct periodic training programs and seminars for both full-time and part-time Magistrates. (28 U.S.C. § 637) See H. Rep. No. 1629, 90th Cong., 2d Sess., p. 19.

Florida, on the other hand, has provided none of these hallmarks of independence and qualifications for office in the statutes presently before this Court. The position of court clerk does not possess the characteristics of an independent judicial office.

The appointing authority for the deputy clerks who are empowered to issue warrants is the city clerk, with the approval of the mayor—executive officials. (Section 160.1 of the Charter of the City of Tampa, Section 1, Chapter 61-2915, Laws of Florida, 1961) The deputy clerks themselves are members of the city civil service, not the judicial branch. (*Id.*) There is no statutorily specified tenure in office as a clerk of the municipal court. There are no statutorily prescribed qualifications for designation as municipal court clerk, nor any required determination of special competency to perform the functions of the office. There is no requirement of bar membership or provision for legal training of court clerks to enable them to carry out their duties.

We do not contend that either the full panoply or any particular combination of these protections and qualifications is necessary to meet constitutional standards. We submit, however, that a court clerk who lacks all these indicia of an independent judicial officer cannot discharge the duty prescribed by the Fourth and Fourteenth Amendments, however "conscientious and impartial" he may be as an individual. See *State v. Paulick*, 277 Minn. 40, 151 N.W. 2d 591, 598 (1967). As the Supreme Court of Minnesota there held:

> "the grave consequences to the accused resulting from a wrongful arrest far outweigh the potential harm to

the community in requiring something more than the peremptory issuance of a warrant by a clerk untrained in the law. The harm to an accused arrested in his home or at his place of work, the humiliation and embarassment to his family, and the fact he has a record of arrest, however unjust, are consequences difficult to measure." 277 Minn. 40, 151 N.W. 2d at 597.

Respectfully submitted,

Maloty B. Frier
1809 North Howard Avenue
Tampa, Florida 33607
Counsel for Appellant

Of Counsel:
Daniel A. Rezneck, Esq.
of the firm of
ARNOLD & PORTER
1229 19th Street, N.W.
Washington, D.C. 20036